Petition

Office - Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

81-514

No. _____

In The

Supreme Court of the United States

October Term, 1980

SKAGGS DRUG CENTERS, INC., a Utah corporation; SUPER X DRUGS CORPORATION, a Michigan corporation; SAFEWAY STORES, INC., a Maryland corporation; NEB'S MARKETS, an Arizona corporation; BACH T. SCHLECHT, dba ECONOMY LIQUORS; and SMITTY'S SUPER-VALU, INC., an Iowa corporation,

Petitioners,

v.

BASELINE LIQUORS, an Arizona corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

Paul G. Ulrich
LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003
602/262-5373
Counsel of Record for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Does the Arizona Court of Appeals holding that A.R.S. § 44-1461 *et seq.* is not a price fixing statute in violation of the Sherman Act conflict in principle with this Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 62 L. Ed. 2d 31 (1980)?

2. Is the Arizona Unfair Sales Act, which by reason of the 12% markup requirement of A.R.S. § 44-1461(A)(1)(c) ignores economies achieved by any particular retailer, arbitrary and discriminatory in violation of due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

3. Are the definitions of "cost to the retailer" set forth in A.R.S. § 44-1461(A)(3) and § 44-1461(A)(1)(c) irreconcilably conflicting and unconstitutionally vague?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE ARIZONA COURT OF APPEALS

The parties to the proceedings in the Arizona Court of Appeals include Skaggs Drug Centers, Inc., a Utah corporation; Super X Drugs Corporation, a Michigan corporation; Safeway Stores, Inc., a Maryland corporation; Neb's Markets, an Arizona corporation; Bach T. Schlecht, dba Economy Liquors; Smitty's Super-Valu, Inc., an Iowa corporation, Circle K Corporation, a Texas corporation; Furrs, Inc., a Texas corporation; Farmers Produce, Inc., an Arizona corporation; Duppa Villa Liquors, Inc., an Arizona corporation; Walgreen Arizona Drug Company, and Bashas Markets, Inc., an Arizona corporation.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. The Arizona Court of Appeals Holding That A.R.S. § 44-1461 et seq. Is not a Price Fixing Statute in Violation of the Sherman Act Conflicts in Principle With This Court's Decision in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.	4
II. The Arizona Unfair Sales Act, By Reason of the 12% Markup Requirement In A.R.S. § 44-1461(A)(1)(c) Which Ignores the Economics Achieved by any Particular Retailer, Is an Arbitrary and Discriminatory Statute Violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.	7
III. The Definitions of "Cost to the Retailer" Set Forth in A.R.S. § 44-1461(A)(3) and § 44-1461 (A)(1)(c) Are Irreconcilably Conflicting and Unconstitutionally Vague.	8
CONCLUSION	10

APPENDICES

APPENDIX A A-1
APPENDIX B B-1
APPENDIX C C-1
APPENDIX D D-1
APPENDIX E E-1

TABLE OF AUTHORITIES

Cases:	*Page*
Baseline Liquors v. Circle K Corp., — Ariz. —, 630 P.2d 38 (App. 1981)	1
California Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)	3, 4
Cohen v. Frey & Son, Inc., 197 Md. 586, 80 A.2d 267 (1951)	7
Connally v. General Construction Co., 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926)	9, 10
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)	6
Flank Oil Co. v. Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960)	9
Giaccio v. State of Pennsylvania, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966)	9, 10
Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)	4, 5
Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978)	6
Serrer v. Cigarette Service Co., 148 Ohio St. 519, 76 N.E. 2d 91 (1947)	7
Trade Commission v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968)	9
United States v. Container Corp. of America, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969)	7
United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)	7

Statutes and Rules

Arizona Revised Statutes:

§ 44-1461 et seq. 1, 2, 4
§ 44-1461(A)(1) 7
§ 44-1461(A)(1)(c) 2, 7, 8
§ 44-1461(A)(3) 2, 8
§ 44-1464 2
§ 44-1465(B) 3
§ 44-1466(A) 3
§ 44-1466(B) 3
15 U.S.C. § 1 ..... 1, 3
28 U.S.C. § 1257(3) 1

Other:

Clark, Statutory Restrictions on Selling Below Cost, 11 Vand. L. Rev. 105 (1957) 7
U.S. Const. amend. XIV 1

OPINIONS BELOW

There is no reported opinion of the Arizona Superior Court. The Superior Court judgment dismissing plaintiff's complaint because it found the statute unconstitutional is attached as Appendix A. The Arizona Court of Appeals Opinion is reported at 630 P.2d 38 (App. 1981) and is attached as Appendix B.

JURISDICTION

Plaintiff Baseline Liquors ("Baseline") filed a complaint on June 1, 1978 alleging that thirteen named defendants were selling liquor, beer and wine at less than "cost" in violation of the Arizona Unfair Sales Act, A.R.S. § 44-1461 *et seq*. On December 6, 1978, the Superior Court entered judgment dismissing Baseline's complaint, specifically finding the statute unconstitutional. See Appendix A.

The Arizona Court of Appeals reversed on April 7, 1981. See Appendix B. A timely motion for rehearing was filed on April 22, 1981, and denied on May 27, 1981. See Appendix C. A timely filed petition for review was thereafter denied by the Supreme Court of Arizona on June 16, 1981. See Appendix D. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are U.S. Const., amend. XIV; 15 U.S.C. § 1; and A.R.S §§ 44-1461 *et seq*. The relevant portions of each are set forth in Appendix E.

STATEMENT OF THE CASE

Baseline's complaint was filed both on its own behalf and allegedly on behalf of all holders of Series 9 liquor licenses in Maricopa County, Arizona. The complaint named thirteen defendants, primarily larger volume retail stores. Many sell liquor as part of a general grocery or drugstore business. Baseline's complaint alleged that defendants, since July 1, 1977, had advertised, offered to sell, and sold liquor, beer and wine at a price less than "cost to the retailer" as defined in the Arizona Unfair Sales Act, A.R.S. § 44-1461 *et seq*. The complaint sought compensatory and punitive damages, as well as an injunction enjoining defendants from advertising, offering to sell, or selling liquor, beer or wine in violation of the statute.

The operative portion of the statute, A.R.S. § 44-1464, prohibits all advertising, offers to sell, or sales of any merchandise by retailers or wholesalers at less than "cost" as defined in the act, if it is accompanied by the intent or effect of inducing the purchase of other merchandise, of unfairly diverting trade from a competitor or otherwise injuring a competitor. "Cost to the retailer" is defined in two separate subsections of A.R.S. § 44-1461. First, "cost to the retailer" is defined as either the invoice cost or the replacement cost of the merchandise, whichever is lower, less trade discounts, plus freight charges, cartage costs and a markup to cover a proportionate part of the cost of doing business. "[I]n the absence of proof of a lesser cost," this markup is arbitrarily established at 12% of the cost to the retailer as determined under this formula. A.R.S. § 44-1461(A)(1)(c). Additionally, and wholly independently, "cost to the retailer" is defined in another subsection, A.R.S. § 44-1461(A)(3), as "bona fide costs." This latter term is not defined anywhere in the statute. No explanation of any relation between the two definitions is provided.

Any retailer who offers to sell or sells at retail any item at less than cost to the retailer as defined in the statute is guilty of a petty offense, A.R.S. § 44-1466(A), and is subject to the injunctive powers of the state's courts, A.R.S. § 44-1465(B). Finally, in determining whether the statute has been violated, A.R.S. § 44-1466(B) provides that proof of any advertising, offer to sell or sale by any retailer in contravention of the policy of the act constitutes prima facie evidence of a violation of the statute.

Defendants' motion to dismiss Baseline's complaint contended that the Unfair Sales Act was unconstitutional in that it operated in an arbitrary and discriminatory fashion and contained several provisions that were unconstitutionally vague. Defendants also contended that the act, in effect, was a price fixing statute establishing retail prices for the sale of liquor, beer and wine in violation of the Sherman Act, 15 U.S.C. § 1. The Superior Court's judgment holding the statute unconstitutional did not state the basis for its ruling. See Appendix A.

All of these issues were also presented to the Arizona Court of Appeals in the briefs, during the oral argument and in the motion for rehearing filed on April 22, 1981. In particular, this Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980), was cited to the Court of Appeals as supplemental authority prior to oral argument. The Court of Appeals, however, rejected all the constitutional arguments presented. It held instead that the 12% markup figure was not "arbitrary" on its face simply because it established a "fixed markup percentage." 630 P.2d at 42. It also rejected the arguments that the "absence of proof of a lesser cost" provision provided no real alternative to the 12% markup provision, *id.*, and that the "cost to the retailer"

definitions in the statute were vague, imprecise and irreconcilably in conflict. *Id.* at 43-44. Although it did not specifically refer to this Court's decision in *California Retail Liquor Dealers Association, supra,* it nonetheless held that the statute was not a price fixing statute in violation of the Sherman Act. *Id.* at 45. The Court of Appeals therefore reversed and remanded the Superior Court's judgment dismissing Baseline's complaint; it then denied defendants' motion for rehearing. Defendants' petition for review was thereafter denied by the Supreme Court of Arizona.

REASONS FOR GRANTING THE WRIT

I. *The Arizona Court of Appeals Holding That A.R.S. § 44-1461 et seq. Is Not a Price Fixing Statute in Violation of the Sherman Act Conflicts in Principle With this Court's Decision in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*

The Arizona Court of Appeals rejected defendants' argument that the Unfair Sales Act was a price fixing statute in violation of the Sherman Act and was not within the state action exemption of that act. Its opinion did not refer to this Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980), even though that decision was cited as a supplemental authority prior to oral argument.

This Court's decision in *California Retail Liquor Dealers Association, supra,* held that the California wine pricing system constituted resale price maintenance in violation of the Sherman Act, since wine producers held the power to prevent price competition by dictating the prices charged by wholesalers. The state's involvement in the system was also held insufficient to establish state action antitrust immunity under *Parker v. Brown*, 317

U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). The Court there also held that the Twenty-first Amendment did not bar application of the Sherman Act to California's wine pricing system.

The California plan for wine pricing violated the Sherman Act because of the requirement that wine producers, wholesalers and rectifiers must file fair trade contracts or price schedules with the state. The state had no direct control over wine prices and it did not review the reasonableness of the price as set by wine dealers. Nonetheless, selling below established prices could lead to a licensee incurring fines, license suspension or license revocation.

Here, the 12% markup requirement similarly amounts to resale price maintenance without direct state control. Since it is impossible as a practical matter to prove a lower cost of doing business with any degree of certainty,* the Unfair Sales Act functionally establishes a minimum price for goods at an arbitrary level of 12%

---

*If a retailer must prove a lesser cost of doing business, then proportion such cost to each individual item sold, what factors should be considered? Employee salaries are probably a cost of doing business. But what about Christmas bonuses, stock options, or stock dividends? All of the following could arguably be considered costs of doing business within the statute: Leases, rentals, capital expenditures for land, buildings or equipment, business trips, employee transportation, lunches, federal income tax, state income tax, property and sales taxes, local property and sales taxes, foreign taxes, liability insurance premiums, workmen's compensation insurance premiums, social security taxes, legal fees, advertising, utilities, postage, licenses, adverse court judgments, fines, accountants' fees, management training and security services. All of these may be legitimate, actual costs of doing business. Which among this non-exhaustive list will any fact finder consider to be a specific cost of business attributable to any specific product at any particular location, given the vague language of the statute? A retailer should not be required to make this determination at his peril without any statutory standards.

above cost. All retailers must mark up their goods at the same minimum rate. This allows a manufacturer to control the minimum retail selling price of his goods in the State of Arizona in direct violation of the Sherman Act.

The California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board.*, 21 Cal. 3d 431, 579 P,2d 476, 146 Cal. Rptr. 565 (1978), has also held that enforcement by the California Department of Alcoholic Beverages Control of a statute requiring liquor retailers to adhere to a minimum price schedule determined and filed by the manufactuers or brand owners of various alcoholic beverages violated the Sherman Act, where the department did not participate in determining the minimum price but enforced the price as submitted by the producers. There, as here, prices were established by the producers according to their own economic interests, and the state's role was restricted to enforcing the prices specified by the producers. Since the Arizona Unfair Sales Act requires all goods to be sold with a minimum of 12% markup, manufacturers are given the unlimited power to establish the minimum retail price of goods in Arizona at whatever level they choose. Since the state plays no role in actually setting these prices, but enforces the prices as specified by the producers, the result is a direct violation of the Sherman Act.

There is no difference in concept between enforcing an actual resale price schedule and enforcing an arbitrary 12% markup requirement. In either event, the result is an illegal fixing or stabilizing of prices at which the retailer must resell products purchased from a wholesaler or manufacturer — a *per se* violation of the Sherman Act. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911). The prohibition against illegal price fixing extends to any course of conduct which has a tendency to affect or stabilize the price of retail products — not just to specific

agreements to establish specific prices. *United States v. Container Corp. of America*, 393 U.S. 333, 337, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23, 60 S. Ct. 811, 84 L. Ed. 1129 (1940).

II. *The Arizona Unfair Sales Act, By Reason of the 12% Markup Requirement in A.R.S. § 44-1461(A)(1)(c) Which Ignores the Economies Achieved by any Particular Retailer, Is an Arbitrary And Discriminatory Statute Violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.*

A.R.S. § 44-1461(A)(1) defines "cost to the retailer" as either the invoice or replacement cost of merchandise less trade discounts, plus certain miscellaneous charges and a markup to "cover a proportionate part of the costs of doing business." In the absence of "proof of a lesser cost," this markup is arbitrarily established at 12%. It applies to all retailers, even though they may be wholly dissimilar in size, location, type of business, business efficiencies, or operational costs. Even if a retailer's actual cost of doing business is less than 12%, he may well be prohibited from passing those cost savings on to the retail buyer, since it may be impossible as a practical matter for a retailer to make that showing. See Clark, *Statutory Restrictions on Selling Below Cost*, 11 Vand. L. Rev. 105, 121-22 (1957). To avoid civil liability, an injunction or criminal prosecution under the statute, therefore, all retailers must impose at least a 12% markup on their merchandise.

At least two courts have condemned the arbitrary and discriminatory operation of provisions identical to those in the Arizona statutes. *See Serrer v. Cigarette Service Co.*, 148 Ohio St. 519, 76 N.E. 2d 91 (1947); *Cohen*

v. Frey & Son, Inc., 197 Md. 586, 80 A.2d 267 (1951). Both those decisions held their state's sales below cost acts unconstitutional because the statutes treated all wholesalers the same, ignored recognized business practices, and disregarded marketplace economies. Both courts recognized that the constitutional flaw in a statute such as the Arizona Unfair Sales Act is that it fails to recognize practices which would enable one merchandiser to sell a particular product at a lower price than a competitor without selling below his actual cost.

In addition to being arbitrary, the statute is also discriminatory and a denial of equal protection in that it applies only to retailers whose markup is less than 12%. Without any apparent justification, it does not apply to retailers who sell products at a markup of greater than 12% but nonetheless at less than their actual cost of doing business. Whatever competitive evils may exist in high volume merchandising where markups may fairly be less than 12% must also surely exist with respect to other products where costs of doing business exceed 12%. By penalizing sales in the one situation and not the other, however, the statute discriminates against those affected by the statute without justification, in violation of the equal protection clause of the Fourteenth amendment.

III. *The Definitions of "Cost to the Retailer" Set Forth In A.R.S. § 44-1461(A)(3) and § 44-1461(A)(1)(c) Are Irreconcilably Conflicting and Unconstitutionally Vague.*

A.R.S. § 44-1461 contains two definitions of "cost to the retailer." Section 44-1461(A)(1)(c) requires a 12% markup "in the absence of proof of a lesser cost." The statute provides no clues as to how a retailer is to prove such a lesser cost, or as to the standards to be used in that regard. Wholly separately, A.R.S. § 44-1461(A)(3) defines "cost to the retailer" as "bona fide costs." Again,

the standards to be used in determining what costs are or are not "bona fide" are also not defined. The statute also fails to define how the two "cost to the retailer" definitions interrelate, if at all.

The Arizona Court of Appeals, relying upon *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958 (1968), and *Flank Oil Co. v. Tennessee Gas Transmission Co.*, 141 Colo. 554, 349 P.2d 1005 (1960), rejected the argument that these definitions were vague, imprecise and in irreconcilable conflict. Those decisions hold that the statutes there involved, which were civil statutes without any criminal sanctions, simply required "reasonable accounting methods" and price determinations made by the retailer "in good faith." The Arizona Court of Appeals also held that the term "bona fide costs" merely required that claimed costs be "non-fraudulent."

With all due respect, these judicially created overlay definitions do not cure the statute's vagueness problems. Since the Arizona statute contemplates criminal liability for any violation, a higher standard of specificity should be required than in the case of statutes such as those involved in the Utah and Colorado cases previously referred to. Moreover, because of the variety of possible accounting methods that might be used in determining costs, it is impossible for an Arizona retailer or wholesaler to determine in advance whether a given judge or jury on any particular day might find the method chosen to be "non-fraudulent," "in good faith," or "arrived at by reasonable accounting methods." Penal statutes prohibiting certain acts and providing a punishment for their violation may not admit of such a double meaning that a citizen may act upon one conception of its requirements and the courts upon another. *E.g., Connally v. General Construction Co.*, 269 U.S. 385, 393, 46 S. Ct.

126, 70 L. Ed. 322 (1926); *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966).

A statute denies due process of law under both state and federal constitutions where it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co., supra.* A vague statute is constitutionally defective because it leaves fact finders free to decide without any legally definable standards as to what is and what is not prohibited in a particular case. *Giaccio v. State of Pennsylvania, supra.* The Unfair Sales Act as interpreted by the Arizona Court of Appeals thus still fails to meet required constitutional standards, and should therefore be invalidated on grounds of vagueness.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LEWIS AND ROCA

By Paul G. Ulrich
100 West Washington Street
Phoenix, Arizona 85003
602/262-5373
Counsel of Record for Petitioners

September, 1981

Appendix A — Arizona Superior Court Judgment.
[Caption Deleted].

The Court having had under advisement the motions of Defendants, Circle K Corporation, Furr's Inc., Neb's Markets, A. J. Bayless Markets, Inc., Skaggs Drug Centers, Inc., Super X Drug Co., Bach T. Schlecht dba Economy Liquors, Farmers Produce Company, Inc., dba Farmers Quality Liquor Stores, Duppa Villa Liquors, Inc., Walgreen Arizona Drug Company, Safeway Stores, Inc., and Smitty's Super-Valu, Inc., to dismiss this action on the grounds that the statute under which it is brought is unconstitutional; the motions of Defendants, Circle K Corporation, Super X Drug Company, Furr's, Inc., Skaggs Drug Centers, Inc., Bach T. Schlecht dba Economy Liquors, Farmers Produce Company, Inc., dba Farmers Quality Liquor Stores, Duppa Villa Liquors, Inc., Walgreen Arizona Drug Company, Safeway Stores, Inc., and Smitty's Super-Valu, Inc. to dismiss those portions of Plaintiffs' Complaint relating to damages and alternative motion to strike; the motions of Defendants, Farmers Produce Company, Inc., dba Farmers Quality Liquor Stores, Skaggs Drug Centers, Inc., Bach T. Schlecht dba Economy Liquors, Safeway Stores, Inc., Duppa Villa Liquors, Inc., A. J. Bayless Markets, Inc., and Walgreen Arizona Drug Company to quash order to show cause; the motions of Defendants Super X Drug Company and Farmers Produce, Inc., dba Farmers Quality Liquor Stores for Summary Judgment; the motion of Defendant Safeway Stores, Inc., to sever; Plaintiffs' motion for leave to file first amended complaint; and the motions of several Defendants for protective orders and orders staying discovery, and the Court having considered said motions and the law applicable, determines that the statute under which this action is brought is unconstitutional and that said motions of the Defendants to dismiss are well taken

and should be granted and that the amendment of Plaintiff's Complaint would not affect the Court's decision, therefore, the Court orders, adjudges and decrees as follows:

IT IS ORDERED that the motions to dismiss of Defendants Circle K Corporation, Furr's Inc., Neb's Markets, A. J. Bayless Markets, Inc., Skaggs Drug Centers, Inc., Super X Drug Company, Bach T. Schlecht, dba Economy Liquors, Farmers Produce Company, Inc., dba Farmers Quality Liquor Stores, Duppa Villa Liquors, Inc., Walgreen Arizona Drug Company, Safeway Stores, Inc., and Smitty's Super-Valu, Inc. are granted.

JUDGMENT is hereby entered in favor of all defendants and Plaintiffs' Complaint is dismissed with prejudice as to all Defendants.

IT IS ORDERED that Defendants recover all their costs incurred.

IT IS FURTHER ORDERED that the order to show cause issued June 2, 1978, is quashed.

IT IS FURTHER ORDERED that Plaintiffs' motion for leave to file first amended complaint is denied.

IT IS FURTHER ORDERED that all other motions under advisement by the Court are now moot by reason of the ruling of the Court.

/S/Robert L. Myers

Robert L. Myers, Judge

DATED: Dec. 4, 1978

Appendix B — Arizona Court of Appeals Opinion.
[Caption Deleted].

An Appeal from the Superior Court of Maricopa County
Cause No. C-369637
The Honorable Robert L. Myers, Judge
REVERSED AND REMANDED

WREN, Chief Judge

The central issue in this appeal is the constitutionality of Arizona's Unfair Sales Act, A.R.S. §§ 44-1461, – 44-1466.

Appellant, Baseline Liquors, filed a complaint in Maricopa County Superior Court on June 1, 1978 alleging that the various named appellees, since July 1, 1977, had advertised, offered to sell and sold liquor, beer and wine to the retailer at a price less than cost, as defined in the Arizona Unfair Sales Act. The complaint also alleged that these activities had reduced competition for the sale of these items within Maricopa County; had unreasonably restrained trade; and had tended to create a monopoly. Compensatory and punitive damages were sought by appellant, as well as an injunction enjoining appellees from advertising, offering to sell or selling liquor, beer or wine in violation of the Act.

The Arizona Unfair Sales Act, A.R.S. §§ 44-1461, – 44-1466 was passed into law in 1939 (Laws 1939, Ch. 39). Its broad purpose was to prohibit the "predatory" practice of selling items at below cost (so-called "loss leaders") for the purpose of injuring competitiors. Arizona was one of a large number of states to enact such a law beginning with South Carolina in 1902. However, the majority of states did not adopt similar legislation until after the passage of the Robinson-Patman Act (Act of

June 19, 1936, Ch. 592, 49 Stat. at L. 1526, 15 U.S.C. §§ 13, 13a, 13b). For a thorough survey of unfair sales acts in the various states *see* Annot. *Validity, construction, and application of statutory provision prohibiting sales of commodities below cost.*, 118 A.L.R. 506 *supplemented*, 128 A.L.R. 1126.

Several of the appellees filed motions to dismiss the complaint, asserting, *inter alia*, the unconstitutionality of the Unfair Sales Act. Following argument on the motions the trial court on December 6, 1978, dismissed the complaint on the ground that the Unfair Sales Act was unconstitutional. Since we have determined that this ruling cannot be upheld on the present record, we reverse and remand for further proceedings.

At the outset we note that there is a strong presumption supporting the constitutionality of a legislative enactment and the party asserting its unconstitutionality bears the burden of overcoming that presumption. *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *State v. Krug*, 96 Ariz. 225, 393 P.2d 916 (1964); *Landgraff v. Wagner*, 26 Ariz.App. 49, 546 P.2d 26 (1976).

A.R.S. § 44-1462 sets forth the legislative purpose in passage of the Unfair Sales Act:

> It is declared that the practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising an an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable

> consequences, including economic depression, and it is hereby declared to be the policy of this state to protect the well-being of its citizens through the prevention, suppression and elimination of unfair methods of competition. The purpose of this act is to carry out such policy in the public interest.

With this stated intent in mind, we turn to the arguments raised by appellees in support of their contention that the act is unconstitutional.

Appellees first contend that A.R.S. § 44-1461 (A)(1)(c)[1] is arbitrary because the 12 percent markup provision ignores various economies achieved by any particular retailer. Specifically, they point out that the 12 percent figure applies to all retailers regardless of size, location, type of business, business efficiencies or operational costs. Thus a retailer who operates in a more efficient manner with lower overhead costs is unable to pass these savings on to his customers if his actual cost of doing business is less than 12 percent. We disagree with this argument. The test for arbitrariness under the due process clauses of the federal and state constitutions is whether the legislative enactment is reasonably re-

---

[1] § 44-1461(A)(1)(c):

> A. In this article, unless the context otherwise requires:
>
> 1. "Cost to the retailer" means the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added:
>
> * * *
>
> (c) A markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be twelve per cent of the cost to the retailer as defined in this section after adding thereto freight charges and cartage but before adding thereto a markup.

lated to a legitimate state interest. *American Federation of Labor v. American Sash & Door Co.*, 67 Ariz. 20, 189 P.2d 912 (1948), *aff'd.* 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222, 6 A.L.R. 2d 481 (1949).[2] Here, appellees do not argue that the interest articulated in A.R.S. § 44-1462 is not a legitimate one. They further concede that the police power of the state extends to regulation and supervision of prices charged by private businesses in order to promote the general welfare. *State v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P.2d 650 (1941). The question, then, is whether this enactment is reasonably related to that interest. We believe that it is, or rather, on the record before us, we are unable to say that it is not. As mentioned earlier, this appeal comes to us on a grant of appellees' motions for dismissal. We find, however, that the record before us is completely devoid of any evidence, testimonial or otherwise, to support appellees' contention that the 12 percent figure is arbitrary. We are thus reduced to inspecting the provision on its face and are unable to say it is arbitrary simply because it establishes a fixed markup percentage. To the contrary, a fixed markup appears to us to be a reasonable means of achieving the stated goal of the act.[3]

---

[2]U.S. Constitution, amendment XIV, § 1, A.R.S. Constitution, Art. 2, § 4. Although *American Sash and Door* only referred specifically to the federal due process clause, we believe the test is the same under the state due process clause. *See Farmer v. Killingsworth*, 102 Ariz. 44, 424 P.2d 172 (1967), *Dimond v. Samaritan Health Service*, 27 Ariz.App. 682, 558 P.2d 710 (1976), *Cf. Valley National Bank of Phoenix v. Glover*, 62 Ariz. 538, 159 P.2d 292 (1945) (equal protection clauses of the federal and state constitutions have the same effect).

[3]We likewise reject appellees' contention that the act violates equal protection; the equal protection and due process clauses are satisfied if all persons in a class are treated alike. *State ex rel Babbit v. Pickrell*, 113 Ariz. 12, 545 P.2d 936 (1976). Here, the statute manifestly treats all retailers alike.

Appellees rely on *Serrer v. Cigarette Service Co.*, 148 Ohio St. 519, 76 N.E.2d 91 (1947) and *Cohen v. Frey & Son, Inc.*, 197 Md. 586, 80 A.2d 267 (1951). We have examined these cases and find them to be inapposite. Although both decisions determined that a fixed markup provision similar to the one considered here was arbitrary, the finding was based on the inherent difference between two types of wholesale operations; "regular" and the so-called "cash and carry". The differences between these two types of operation were found to be so great that any statutory attempt to treat the two in a similar fashion was determined to be arbitrary. Here of course, no such distinction is argued as to different types of retailers. Furthermore, in both *Serrer* and *Cohen*, unlike here, the distinction between the wholesale types was able to be fully explored, since both were appeals following full evidentiary trials on the merits.

Furthermore, we have determined that the statute here is not arbitrary for the reason that it contains a provision allowing a retailer to sell at a lower cost than the fixed 12 percent markup Since §§ 44-1461(A)(1)(c) states that the 12 percent shall be added "in the absence of proof of a lesser cost . . .", it thus provides a party with the opportunity of showing that, because its (his) costs were less than 12 percent, it could sell at some figure less than the statutorily designated percentage.

Appellees, however, claim that the "absence of proof of a lesser cost" provision in reality provides no alternative to the 12 percent markup figure because it is impossible for a retailer to determine the cost of doing business attributable to each item he sells. We disagree. This issue has been considered in two cases of neighboring jurisdictions, *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958 (1968) and *Flank Oil Company v. Tennessee Gas Transmission Company*, 141

Colo. 554, 349 P.2d 1005 (1960). In *Trade Commission*, the Utah Supreme Court stated:

> We agree with appellant's position that the lower court's conclusion that the 6% presumption provides no real alternative because it is "impractical" or "impossible" to prove actual cost under defendant's operating conditions, is neither supported by the evidence, nor is it in accordance with the guidelines this court has established in determining the constitutionality of a statute. We are of the opinion the trial court erred in holding the Act requires the cost must be exact. All the statute requires is a cost figure arrived at by reasonable accounting methods. A statute is not to be declared invalid because of difficulty in applying its provisions. We think the Act is sufficiently clear to require compliance. The constitutionality of a statute is not to be decided on questions of inconvenience, or difficulty in application of a cost standard. 21 Utah 2d at 439–440, 446 P.2d at 963–964 (footnotes omitted).

In *Flank Oil*, the same analysis was made:

> Hence, in the absence of provisions to the contrary, we must presume that the legislature did not intend to prescribe that the cost must be absolutely exact, and that it must be based upon the precise method of accounting which any one merchant might adopt, but meant, by "cost", what business men generally mean, namely, the approximate cost arrived at by a reasonable rule. Hence, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable, and does not disclose an intentional evasion of the law, the method so adopted should be accepted as correct. In other words, all that a man is required to do under the statute is to act in good faith. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed.402. In that view of the case, the standard set by the legislature

is virtually reduced to one of "reasonableness." And it is held that "reasonableness" as "a standard of an act, which can be determined objectively from circumstances, is a common, widely-used, and constitutionally valid standard in law." People v. Curtiss, 116 Cal.App.Supp. 771, 300 P. 801, 805, and cases cited. This, in our opinion, is a fair statement and meets with our approval.

There is no contention here that the cost must be absolutely exact. Good faith, however, is necessary. 141 Colo. at 566-657, 349 P.2d at 1012–1013, *citing Dikeou v. Food Distributors Association,* 107 Colo. 38, 108 P.2d 529 (1940).

We agree with the reasoning set forth in these cases and find that appellees have failed in their burden of proving that the "absence of proof of a lesser cost" provision provides no real alternative to the 12 percent markup provision. In so doing, we again note, that the fact that this case never went to trial precludes any attempt to rule on these issues, in that there is no record to which this court can refer. The same problem was alluded to in *Flank Oil.*

It is, of course, desirable that a full hearing be held in connection with constitutional objections. This view was expressed in the case of People ex. rel. Attorney General v. Barksdale, 104 Colo. 1, 87 P.2d 755, 757 wherein the Court declared:

"* * * Especially in disposing of constitutional objections is it important to give a full hearing, first in regard to the proper allegations in pleadings, and then—as a rule—on the facts, which after all must usually determine whether a particular situation dealt with by the legislative branch does or does not justify a particular enactment, and whether or not in some respects, not appearing from the allegations themselves, the General Assembly has over-

> stepped the constitutional bounds. 141 Colo. at 560–561, 349 P.2d at 1009.

In the absence of such a "full hearing", we reject the contention that the 12 percent markup is arbitrary and that the "absence of proof of a lesser cost" provision provides no alternative.

Appellees' next argument concerns the wording of A.R.S. § 44-1461(A)(3) which states:

> 3. "Cost to retailer" and "cost to the wholesaler" mean bona fide costs.

They assert that this definition is vague and imprecise and irreconcilably conflicts with the definition of "cost to the retailer" set forth in A.R.S. § 44-1461(A)(1). Again we disagree.

A.R.S. § 44-1461(A)(3) originally defined cost to the retailer and cost to the wholesaler as:

> bona fide costs; *and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler;* . . . Laws 1939, Ch. 39, § 2 (emphasis added).

As appellees point out, the emphasized portion was held to be unconstitutionally vague in *State v. Walgreen Drug Co., supra*. It was therefore severed from the rest of the statute, leaving the present wording. We do not find the term "bona fide" to be vague, because it has a well settled meaning in law. Webster's Third New International Dictionary (unabridged, 1969) defines it as "made in good faith without fraud or deceit . . . sincere . . . genuine." Black's Law Dictionary, Fourth Edition (1951) defines it as "In or with good faith; honestly, openly, and sincerely; without deceit or fraud". We think it is clear, then, that use of the term bona fide cost in A.R.S. § 44-1461(A)(3) means "non fraudulent". For this reason, we reject ap-

pellees' argument regarding any conflict between §§ 44-1461 (A)(1) and 44-1461(A)(3). In our opinion, the former section sets forth the technical definition of cost, whereas the latter requires that such claimed costs be non-fraudulent.

Since appellees' next two arguments are conceptually related, we consider them together. Referring to the provision of the act allowing for penal liability, they first posit that the act fails to require sufficient criminal intent to satisfy due process. As support they refer us to A.R.S. § 44-1464, which makes it illegal for any retailers to advertise, offer to sell or sell any merchandise at less than cost "with the intent or effect of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor or otherwise injuring a competitor . . ." This argument continues that since the statute reads in the disjunctive ("either intent *or* effect . . .") it impermissibly renders it unnecessary to prove intent to violate it. Again we find this argument to be without merit. The exact issue was considered in *State v. Walgreen Drug Co., supra,* wherein it was stated:

> We consider then the objection that the chapter imposes both civil and penal liability upon one who violates its provisions without any criminal intent . . . we think that while it is not explicitly stated therein that the particular thing done must be done with a criminal intent, the only reasonable implication from the entire language of the chapter is that such intent is an essential ingredient of a violation thereof. A similar construction has been given to statutes which fail, as does ours, explicity to require the criminal intent. 57 Ariz. at 317, 113 P.2d at 654–655.

Appellees, however, point out that the legislature reenacted the act after *Walgreen* and retained the disjunctive language; that therefore this court is not bound by its holding. We disagree. *Walgreen* found that the lan-

guage of the chapter made it clear that intent is an essential ingredient in proving a violation of the act. In our opinion, the mere fact that the legislature re-enacted the act with the language unchanged does not render *Walgreen* inapplicable. We therefore follow its holding.

Appellees next challenge concerns the wording of A.R.S. § 44-1466 which states:[4]

> A. Any retailer who, in contravention of the policy of this article, advertises, offers to sell or sells at retail any item of merchandise at less than cost to the retailer as defined in this article or any wholesaler who, in contravention of the policy of this article advertises, offers to sell or sells at wholesale any item of merchandise at less than cost to the wholesaler as defined in this article, is guilty of a petty offense.
>
> B. Proof of any advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this aricle is prima facie evidence of a violation of this article.

Appellees assert that paragraph (B) creates a prima facie presumption of intent to injure, thus unconstitutionally placing the burden of proving lack of intent upon the defendant. We disagree. There is no alteration of the burden of proof in a prosecution under the statute. Such burden of proof remains, as it must, on the state. *State v. Garcia*, 116 Ariz. 546, 570 P.2d 488 (1977). What the statute does permit, however, is the use by the state of an evidentiary presumption of a violation upon proof that a retailer has advertised, offered to sell or sold in con-

---

[4]After filing of the motions for dismissal but before judgment, A.R.S. § 44-1466 was amended, the penalty for violation being reduced from a misdemeanor to a petty offense. Since this change is irrelevant as to the issue raised regarding the statute, we refer to the amended version.

travention of the policy of the article. As such, the presumption is not unlike those allowed in other areas of criminal law such as the presumption of intoxication from proof of the presence of 0.15 percent or more by weight of alcohol in a person's blood, *State v. Childress*, 78 Ariz. 1, 274 P.2d 333, 46 A.L.R.2d 1169 (1954), the presumption of sanity in criminal prosecutions, *State v. Sanchez*, 117 Ariz. 369, 573 P.2d 60 (1977) or the presumption that driving in excess of the posted speed limit is unreasonable and unlawful. *State v. Rich*, 115 Ariz. 119, 563 P.2d 918 (App. 1977).

Appellees' final argument is that the act constitutes a price fixing statute in violation of the Sherman Act[5] and is not within the state action exemption of the Sherman Act, citing *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978). We disagree. The *Rice* opinion dealt with a fair trade law in California. It found that the law violated the Sherman Act and was not protected by the state action exemption to the law. That is not the situation here, since this statute is not a fair trade act, but one which prohibits below-cost sales for the purpose of injuring competition. That there is a difference is manifested by the fact that until 1976, Arizona had *both* a fair trade act *and* an act prohibiting below-cost sales. The former was repealed, Laws 1976, Ch. 81 § 13. It is also manifested by the fact that *Rice*, after holding that the California fair trade statute violated the Sherman Act, affirmed the validity of California's "loss leader" prohibition statute, the analogue of Arizona's Unfair Sales Act:

> Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of the price maintenance laws

---

[5]15 U.S.C. § 1 *et. seq.*

> without running afoul of the Sherman Act. Thus, our laws prohibit the sale of any product as a "loss leader (Bus. & Prof. Code, § 17044) . . ." 21 Cal. 3d at 458, 146 Cal.Rptr. at 603, 579 P.2d at 494.

We thus hold that the Sherman Act is inapplicable to the Unfair Sales Act because the Unfair Sales Act is not a price-fixing statute.[6] As was stated in *Drink, Inc. v. Babcock*, 77 N.M. 277, 421 P.2d 798 (1966).

> [T]he legislature has the power to act on the subject of below-cost sales and their effect on free competition, and may adopt legislation relating to the establishing of prices on alcoholic beverages with the view and purpose of regulating and controlling the liquor business in the interest of the public welfare. 77 N.M. at 284, 421 P.2d at 803.

The judgment of the trial court dismissing appellant's complaint is reversed and remanded.

/S/Laurance T. Wren

LAURANCE T. WREN,
CHIEF JUDGE
Division One

---

[6]*Cf. State v. Arizona Licensed Beverage Association, Inc.*, No. 14692 (Supreme Court, filed March 11, 1981) (agreements authorized by fair trade act are excepted from antitrust prohibitions of state antitrust act.)

CONCURRING:

/S/Joe W. Contreras

JOE W. CONTRERAS,
PRESIDING JUDGE
Department A

/ S/Francis J. Donofrio

FRANCIS J. DONOFRIO,
JUDGE

Appendix C — Arizona Court of Appeals Order Denying Motion for Rehearing.
[Caption Deleted]

The motion for rehearing and the response thereto were considered by the Court, Presiding Judge Joe W. Contreras and Judges Laurance T. Wren and Francis J. Donofrio participating.

IT IS ORDERED denying the motion.

DATED this 27th day of May, 1981.

/S/Joe W. Contreras
JOE W. CONTRERAS,
PRESIDING JUDGE
Department A

Appendix D-1

Appendix D — Order of Arizona Supreme Court Denying Petition for Review.
[Caption Deleted]

The following action was taken by the Supreme Court of the State of Arizona on June 16, 1981 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 17th day of June, 1981.

S. ALAN COOK, Clerk
By /S/Linda J. Quintans
Deputy Clerk

[List of those receiving notice deleted.]

Appendix E — Constitutional Provisions and Statutes Involved.

1. United States Constitution, Amendment 14: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 15 U.S.C. § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

3. A.R.S. § 44-1461 *et seq.*

   "§ 44-1461. Definitions

   A. In this article, unless the context otherwise requires:

   1. "Cost to the retailer" means the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added:

   (a) Freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as defined in this section.

   (b) Cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three fourths of one per cent of the cost to the retailer as defined in this section after adding thereto freight charges but before adding thereto cartage and markup.

   (c) A markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be twelve per cent of the

cost to the retailer as defined in this section after adding thereto freight charges and cartage but before adding thereto a markup . . . .

3. "Cost to the retailer" and "cost to the wholesaler" mean bona fide costs . . . .

5. "Retailer" means and includes every person, partnership, corporation or association engaged in the business of making sales at retail within this state, except that, in the case of a person, partnership, corporation or association engaged in the business of making sales both at retail and sales at wholesale, the term shall be applied only to the retail portion of the business . . . .

§ 44-1464. Certain advertising and sales defined as unfair competition contrary to public policy

Any advertising, offer to sell or sale of any merchandise by retailers or wholesalers at less than cost as defined in this article, with the intent or effect of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, is unfair competition and contrary to public policy and the policy of this article where the result of advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to lessen competition substantially, or to restrain trade unreasonably, or to tend to create monopoly in any line of commerce.

§ 44-1465. Jurisdiction of courts to enjoin violations of article; duty of county attorneys to bring actions to restrain violations; availability of injunctive relief to private persons

A. In addition to the penalties provided in § 44-1466,

the courts of this state shall have jurisdiction to prevent and restrain violations of this article. The county attorneys, in the respective counties, shall institute proceedings to prevent and restrain violations.

B. Any person damaged or who is threatened with loss or injury by reason of a violation of this article, may bring an action for injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation of this article.

§ 44-1466. Violations; penalties

A. Any retailer who, in contravention of the policy of this article, advertises, offers to sell or sells at retail any item of merchandise at less than cost to the retailer as defined in this article, or any wholesaler who, in contravention of the policy of this article advertises, offers to sell or sells at wholesale any item of merchandise at less than cost to the wholesaler as defined in this article, is guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars.

B. Proof of any advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this article is prima facie evidence of a violation of this article.

Appendix

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-514

In The

Supreme Court Of the United States

October Term, 1981

SKAGGS DRUG CENTERS, INC., a Utah corporation, et al.,

Petitioners,

vs.

BASELINE LIQUORS, an Arizona corporation,

Respondent.

SUPPLEMENTAL APPENDIX F TO PETITION FOR A WRIT OF CERTIORARI

LEWIS AND ROCA
By Paul G. Ulrich
100 West Washington Street
Phoenix, Arizona 85003
602/262-5373
Counsel of Record for Petitioners

No. 81-514

In The

Supreme Court Of the United States

October Term, 1981

SKAGGS DRUG CENTERS, INC., a Utah corporation, et al.,

Petitioners,

vs.

BASELINE LIQUORS, an Arizona corporation,

Respondent.

SUPPLEMENTAL APPENDIX F TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX F

Pursuant to Supreme Court of the United States Rule 28.1, petitioners herewith submit the following list of parent, subsidiary, and affiliate corporations required by that rule:

1. *Skaggs Drug Centers, Inc.*

Skaggs Drug Centers, Inc. is a wholly-owned subsidiary of Skaggs Companies, Inc.

Skaggs Companies, Inc., is the operator of retail drug and grocery outlets variously known as Skaggs, Skaggs Drug Centers and Skaggs-Alpha Beta. Skaggs Companies, Inc., is a wholly-owned subsidiary of American Stores Company.

Alpha Beta Company, operator of retail drug and grocery outlets known as Alpha Beta and Skaggs-Alpha Beta, is also a wholly-owned subsidiary of American Stores Company.

2. *Super X Drugs Corporation.*

Super X Drugs Corporation is a subsidiary of The Kroger Company. Other subsidiaries and affiliates of The Kroger Company include the following: Bell Pharmacal Corporation; Beltline Plaza, Inc.; Country Oven, Inc.; Delight Products Company; Egg City of Arkansas, Inc.; Egg City of Illinois, Inc.; Embassay International, Inc.; Expressway Plaza, Inc.; Farmers' Market Warehouse Store, Inc.; The Gold Crest Candy Co.; Julius Goldman's Egg City; Gromarco Inc.; Henke & Pillot, Inc.; Henpil, Inc.; Inter-American Foods, Inc.; Jubilee Products, Inc.; Kings Dominion Corporation; Kro-Bev Company; Kroger Realty Co.; Market Basket Company; Ohio Store Service, Inc.; Pace Dairy Foods Company; Peyton's, Inc.; Peyton's-Southeastern, Inc.; Savon-Market Basket, Inc.; South Atlantic Distributing, Inc.; Sugar Creek Packing Co.; Swayne Field, Inc.; Texsu, Inc.; Topvalco, Inc.; Vandervoort Dairy Foods Company; Wesco Foods Company; Wyatt Food Stores, Inc.; Wydiv, Inc.; K B Specialty Foods Co.; Second Synchro Realty, Inc.; Synchro Realty, Inc.; Third Synchro Realty, Inc.

3. *Safeway Stores, Inc.*

Australian Safeway Limited; Australian Safeway Stores Pty. Ltd.; Canada Safeway International Finance

Corp.; Canada Safeway Limited; Chelsea Supermart Proprietary Limited; Clearbrook Foods, Ltd.; Empress Foods Ltd.; Glacier Cold Storage Ltd.; Glencourt, Inc.; Holly Enterprises, Inc., John Gardner (Super Markets) Limited; Johs. Esmarch's Eftf. A/S; Lucerne Foods Ltd.; Macdonalds Consolidated Limited; Ornakarn Ltd.; Pratt's Croydon Pty. Ltd.; Pratt's (Forest Hills) Pty. Ltd.; Prideaux' (London) Limited; Safeway Food Stores Holdings Ltd.; Safeway Food Stores Limited; Safeway Holdings, Inc.; Safeway Property (Aylesford) Ltd.; Safeway Stores Establishment; Safeway Stores, Inc. of Wyoming; Safeway Stores, Incorporated; Safeway Stores Pty. Ltd.; Safeway Super "S" Limited; "Safeway" Supermarkt GmbH; Safeway U.K. Properties Limited.

4. *Neb's Markets:* None.

5. *Bach T. Schlecht, dba Economy Liquors*: None.

6. *Smitty's Super-Valu, Inc.*

Smitty's Super-Valu, Inc. is a wholly-owned subsidiary of Steinberg B.V., a Netherlands corporation, which in turn is owned by Steinberg International Inc., a Canadian holding company, which in turn is wholly-owned by Steinberg, Inc., a public company incorporated under the laws of the Province of Quebec, Canada. Other subsidiaries and affiliates of Steinberg, Inc. are as follows: Atlantic Sugar Ltd.; Aygal Inc.; Gambit Distributors Inc.; Famiprix Ltd.; Hypermarche Inc.; Intercity Food Services Inc.; Miracle Mart Inc.; Multimarques Inc.; Multi Restaurants Inc.; Oak Pharmacies Limited; Orcom Inc.; Phenix Flour Limited; Pik-Nik Inc.; Salisbury House of Canada Ltd.; Steinberg Enterprises Ltd.; Steinberg Foods Limited; Steinberg Leasing Inc.; Torchal Holdings Limited; Unibisc Inc.; Valdi Inc.; Ivanhoe Inc,; Alanda Realties Ltd.; Beaconsfield Shopping Centre Inc.; Forest Shop-

ping Centre Ltd.; La Compagnie D'Amenagement; Metropolitan Limitee; Cote St. Luc Shopping Centre Ltd.; Cote St. Michel Holdings Ltd.; Dalton Road Development; Devex Inc.; Dixville Holdings Ltd.; Dorval Gardens Shopping Centre Inc.; Ebro Management Ltd.; Electra Realty Inc.; Elmvale Shopping Center Limited; Fiesta Shopping Centres Ltd.; Galva Realties Ltd.; Les Immeubles Lacordaire Ltd; Intercentres Limited; Justinian Developments Ltd.; Longue Pointe Holdings Ltd.; Montenach Shopping Centre Ltd.; Ridgewood Housing & Development Company; Sanrosa Investments Ltd.; Shari Realties Ltd.; Steinberg Realty Limited; Steinberg's Shopping Centres Limited; Van Horne Shopping Center Inc.; Ville Jacques Cartier; Shopping Centre Inc.; Ville-Neuve Construction Limitee; Wilderton Shopping Centre Inc.; Bayshore Shopping Centre Ltd.; Au Carrefour Des Villes Ltee; Cavendish Shopping Centre Company Limited; Centres Commerciaux Regionaux Du Quebec Limited; DeSalaberry Realties Ltd.; Fairway St. Catherines Limited; Greenfield Park Shopping Plaza Limited; Morgan's Rockland Centre Inc.; Ivanhoe America Inc.; B. Development Corporation; P. Development Corporation; R. Development Corporation; F. Development Corporation; E & R Development Corporation; Orbit Properties Limited; Ebro Properties Limited.

NOTE: A. J. Bayless Markets, Inc. was previously inadvertently not included in the "List of All Parties to Proceedings in The Arizona Court of Appeals." It should be added to that list.

Respectfully submitted,

LEWIS AND ROCA

By Paul G. Ulrich
100 West Washington Street
Phoenix, Arizona 85003
602/262-5373
Counsel of Record for Petitioners

Opposition

Office - Supreme Court, U.S.
FILED
OCT 13 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-514

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SKAGGS DRUG CENTERS, INC., a Utah corporation; SUPER X DRUGS CORPORATION, a Michigan corporation; SAFEWAY STORES, INC., a Maryland corporation; NEB'S MARKETS, an Arizona corporation; BACH T. SCHLECHT, dba ECONOMY LIQUORS; and SMITTY'S SUPER-VALU, INC., an Iowa corporation,

Petitioners,

v.

BASELINE LIQUORS, an Arizona corporation,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

THAYER C. LINDAUER
THAYER C. LINDAUER, P.C.
222 N. Central Avenue
Phoenix, Arizona 85004
(602) 258-2787
COUNSEL OF RECORD FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Does the Arizona Court of Appeals holding that A.R.S. §44-1461 et seq. is not a price fixing statute in violation of the Sherman Act conflict in principle with this Court's decision in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 62 L.Ed.2d 31 (1980)?

2. Is the Arizona Unfair Sales Act, with its minimum 12% markup requirement of A.R.S. §44-1461(A)(1)(c) arbitrary and discriminatory in violation of due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

3. Are the definitions of "cost to the retailer" set forth in A.R.S. §44-1461(A)(3) and §44-1461(A)(1)(c) irreconcilably conflicting and unconstitutionally vague?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE.....	3
REASONS FOR DENYING THE WRIT.....	6
I. The Arizona Court of Appeals Holding That A.R.S. §44-1461, et seq. is Not a Price Fixing Statute in Violation of the Sherman Act Does Not Conflict in Principle with this Court's Decision in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.	6
II. The Arizona Unfair Sales Act, by Reason of the 12% Markup Requirement in A.R.S. §44-1461 (A)(1)(c) does not Ignore the Economies Achieved by any Particular Retailer and is Not an Arbitrary and Discriminatory Statute Violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution	10
III. The Definitions of "Cost to the Retailer" Set Forth in A.R.S. §44-1461(A)(3) and §44-1461(A)(1)(c) are Not Irreconcilably in Conflict nor Unconstitutionally Vague.....	13
CONCLUSION	16

APPENDICES

APPENDIX A A-1
APPENDIX B B-1
APPENDIX C C-1
APPENDIX D D-1
APPENDIX E E-1

TABLE OF AUTHORITIES

Cases	Page
Baseline Liquors v. Circle K Corp., -Ariz.-, 630 P.2d [illegible] (App. 1981).....	1.
California Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).....	5,6,7.
Cohen v. Frey & Son, Inc., 197 Md. 586, 80 A.2d 267 (1951).....	12.
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 St. Ct. 376, 55 L.Ed. 502 (1911)	9.
Flank Oil Co. v.Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960).....	14.
Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).....	7.
Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal.3d 431, 579 P.2d 476, 146 Cal.Rptr. 585 (1978).....	9.
Serrer v. Cigarette Service Co., 148 Ohio St. 519, 76 N.E.2d 91 (1947).....	12.
Trade Commission v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968)	14.
United States v. Container Corp. of America, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969).....	9,10.
United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed 1129 (1940)	10.

Statutes and Rules

Arizona Revised Statutes:

§44-1461 et seq..... 1,2,3.
§44-1461 (A) (1) ..... 11.
§44-1461(A) (1) (c).....4,10,13,15.
§44-1461(A) (3) ..... 4,13.
§44-1464..... 3.
15 U.S.C.§1..... 2,4,5.
28 U.S.C.§1257(3) ..... 2.

Other:

U.S. Const. amend. XIV ..... 2.

OPINIONS BELOW

There is no reported opinion of the Arizona Supreme Court. The Supreme Court judgment dismissing plaintiff's complaint because it found the statute unconstitutional without specification of reasons is attached as Appendix A. The Arizona Court of Appeals Opinion is reported at 630 P.2d 38 (App. 1981). and is attached as Appendix B.

JURISDICTION

Plaintiff Baseline Liquors ("Baseline") filed a complaint on June 1, 1978 alleging that thirteen named defendants were selling liquor, beer and wine at less than "cost" in violation of the Arizona Unfair Sales Act, A.R.S. §14-1461 et seq. On December 6, 1978, the Superior Court entered judgment dismissing Baseline's complaint, specifically finding the statute unconstitutional. See Appendix A.

The Arizona Court of Appeals reversed on April 7, 1981. See Appendix B. A timely motion for rehearing was filed on April 22, 1981, and denied on May 27, 1981. See Appendix C. A timely filed petition for review was thereafter denied by the Supreme Court of Arizona on June 16, 1981. See

Appendix D. This Court has jurisdiction under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are U.S.Const., amend. XIV; 15 U.S.C.§1; and A.R.S.§§44-1461, et seq. The relevant portions of each are set forth in Appendix E.

STATEMENT OF THE CASE

Baseline's complaint was filed both on its own behalf and on behalf of all holders of Series 9 liquor licenses in Maricopa County, Arizona. The complaint named thirteen defendants, primarily larger volume retail stores. Many sell liquor as part of a general grocery or drugstore business. Baseline's complaint alleged that defendants, since July 1, 1977, had advertised, offered to sell, and sold liquor, beer and wine at a price less than the invoice or replacement cost of the merchandise and, as to those sales and offers to sell above invoice or replacement cost, that the offers to sell and sales were at a price less than "cost to the retailer" as defined in the Arizona Unfair Sales Act, A.R.S. §44-1461, et seq. The complaint sought compensatory and punitive damages, as well as an injunction enjoining defendants from advertising, offering to sell, or selling liquor, beer or wine in violation of the statute.

The operative portion of the statute, A.R.S. §44-1464, prohibits all advertising, offers to sell, or sales of any merchandise by retailers or wholesalers at less than "cost" as defined in the act, if it is

accompanied by the intent or effect of inducing the purchase of other merchandise, of unfairly diverting trade from a competitor or otherwise injuring a competitor. "Cost to the retailer" is defined in two separate subsections of A.R.S. §44-1461. First "cost to the retailer" is defined as either the invoice cost or the replacement cost of the merchandise, whichever is lower, less trade discounts, plus freight charges, cartage costs and a markup to cover a proportionate part of the cost of doing business. "[I]n the absence of proof of a lesser cost," this markup is established at 12% of the cost to the retailer as determined under this formula. A.R.S. §44-1461(A)(1)(c). Additionally, "cost to the retailer" is further defined in another subsection, A.R.S. §44-1461(A)(3), as "bona fide costs."

Defendants' motion to dismiss Baseline's complaint contended that the Unfair Sales Act was unconstitutional in that it operated in an arbitrary and discriminatory fashion and contained several provisions that were unconstitutionally vague. Defendants also contended that the act, in effect, was a price fixing statute establishing retail prices for the sale of liquor, beer and wine in violation of the Sherman Act, 15 U.S.C.

§1. The Superior Court's judgment holding the statute unconstitutional did not state the basis for its ruling. See Appendix A.

All of these issues were also presented to the Arizona Court of Appeals in the briefs, during the oral argument and in the motion for rehearing filed on April 22, 1981. In particular, this Court's decision in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), was cited to the Court of Appeals as supplemental authority prior to oral argument. The Court of Appeals, however, rejected all the constitutional arguments presented. It held instead that the 12% markup figure was not "arbitrary" on its face simply because it established a "fixed markup percentage." 630 P.2d at 42, it also rejected the arguments that the "absence of proof of a lesser cost" provision provided no real alternative to the 12% markup provision, without evidentiary proceedings at the Trial Court level to that issue raised, id. The Court of Appeals also determined that the "cost to the retailer" definitions in the statute were not vague, imprecise

or irreconcilably in conflict and, in fact, were harmonious with one another. Id. at 43-44. The Court of Appeals also held that the statute was not a price fixing statute in violation of the Sherman Act. Id. at 45. The Court of Appeals therefore reversed and remanded the Superior Court's judgment dismissing Baseline's complaint; it then denied defendants' motion for rehearing. Defendants' petition for review was thereafter denied by the Supreme Court of Arizona.

REASONS FOR DENYING THE WRIT

I. The Arizona Court of Appeals Holding That A.R.S. §44-1461, et seq. Is Not a Price Fixing Statute in Violation of the Sherman Act Does Not Conflict in Principle With this Court's Decision in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.

The Arizona Court of Appeals rejected defendants' argument that the Unfair Sales Act was a price fixing statute in violation of the Sherman Act and was not within the state action exemption of that act. Its opinion

did not refer to this Court's decision in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), even though that decision was cited as a supplemental authority prior to oral argument.

This Court's decision in California Retail Liquor Dealers Association, supra, held that the California wine pricing system constituted resale price maintenance in violation of the Sherman Act, since wine producers held the power to prevent price competition by dictating the prices charged by wholesalers. The state's involvement in the system was also held insufficient to establish state action antitrust immunity under Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Court there also held that the Twenty-first Amendment did not bar application of the Sherman Act to California's wine pricing system.

The California plan for wine pricing violated the Sherman Act because of the requirement that wine producers, wholesalers and rectifiers must file fair trade contracts or price schedules with the state. The state had no direct control over wine

prices and it did not review the reasonableness of the price as set by wine dealers. Nonetheless, selling below established prices could lead to a licensee incurring fines, license suspension or license revocation.

In the instant case, the 12% markup requirement in the absence of proof of lesser cost does not amount to resale price maintenance with direct state control. Petitioner would have this Court believe that as a practical matter to prove a lower cost of doing business is impossible and, therefore, the Unfair Sales Act functionally establishes a minimum price for goods at an arbitrary level of 12% above cost.

For this proposition, Petitioner cites no authority as there is none. Per contra, Respondent respectfully suggests that any reasonable accounting application done in good faith would be sufficient to establish "proof of a lesser cost." In this context, Respondent suggests that Petitioner could well use "generally accepted accounting principles, consistently applied."

In any event, the entire premise upon which Petitioner bases its argument is that "proof of a lesser cost" is not a viable

alternative. In making its motion to dismiss before the Trial Court and in proceedings before the Arizona Court of Appeals, Petitioner and the other defendants in the case offered no evidence whatsoever that proof of a lesser cost constituted a practical impossibility. Thus, contrary to the arguments of Petitioner, the Arizona Court of Appeals reserved the question of whether or not the 12% alternative price markup was, in fact, the only price markup and, therefore, an arbitrary one:

> "We agree with the reasoning set forth in these cases and find that Appellees have failed in their burden of proving the 'absence of proof of a lesser cost' provision provides no real alternative to the 12% markup provision. In so doing, we again note, that the fact that this case never went to trial precludes any attempt to rule on these issues, in that there is no record to which this Court can refer ..." (Index B-7)

Petitioner's reliance on the cases of Rice v Alcoholic Beverage Control Appeals Board., 21 Cal.3d 431, 579 P.2d 476, 146 Cal. Rptr. 565 (1978) and Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), United States v. Container Corp. of America,

393 U.S. 333, 337, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969) and United States v Socony-Vacuum Oil Co., 310 U.S. 150, 222-23, 60 S. Ct. 811, 84 L.Ed. 1129 (1940) are each inapplicable to the instant case as such are cases where the price fixing mechanism was arbitrary. In the case here, Petitioner argues arbitrariness to the alternative 12% markup but offers no factual bases for the contention. The Arizona Court of Appeals did not reject Petitioner's argument before that court, it simply and correctly noted that there was no factual bases before the Court to support Petitioner's argument and left that issue open for evidentiary proceedings and ultimate determinations at a later date, if applicable.

II. The Arizona Unfair Sales Act, By Reason of the 12% Markup Requirement in A.R.S. §44-1461(A)(1)(c) does not Ignore the Economies Achieved by any Particular Retailer and is Not an Arbitrary and Discriminatory Statute Violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the

United States Constitution.

A.R.S. §44-1461(A)(1) defines "cost to the retailer" as either the invoice or replacement cost of merchandise less trade discounts, plus certain miscellaneous charges and a markup to "cover a proportionate part of the costs of doing business." In the absence of "proof of a lesser cost," this markup is arbitrarily established at 12%. It applies to all retailers, even though they may be wholly dissimilar in size, location, type of business, business efficiencies, or operational costs. If a retailer's actual cost of doing business is less than 12%, he is not prohibited from passing those cost savings on to the retail buyer.

Respondent's argument set forth in I hereinabove applies with full force and effect to the contentions of Petitioner under its reasons for granting the Writ, paragraph II. Once again, in its argument under paragraph II, Petitioner relies on the unsupported assertion that the alternative 12% markup is fixed and arbitrary, that there is no practical alternative of "proof of a lesser cost."

Petitioner's reliance on the cases

of Serrer v. Cigarette Service Co., 148 Ohio St. 519, 76 N.E.2d 91 (1947) and Cohen v Frey & Son, Inc., 197 Md. 586, 80 A.2d 267 (1951) is inappropriate. Both those decisions found their state's sales below cost acts unconstitutional because the statutes treated all persons covered the same, thereby ignoring recognized business practices and disregarding marketplace economies.

Until and unless Petitioner can provide evidentiary support to its contention that "proof of a lesser cost" provides no real alternative, that provision in the Arizona Unfair Sales Act precisely recognizes the practices which would enable one merchandiser to sell a particular product at a lower cost than a competitor without selling below his actual cost.

Petitioner next posits as a reality that some merchandisers effected by the Arizona Unfair Sales Act must have costs of business exceeding 12% (again, without any factual evidentiary bases in the record of the case) and then posits that such persons might also sell below their actual costs of doing business but not be penalized, as are

those whose cost of doing business is less than 12% but who must sell at a 12% markup. This is but another inaccurate portrayal of the Arizona Unfair Sales Act as providing no alternative to the 12% markup. The Arizona Unfair Sales Act does provide such an alternative and there is no evidence whatsoever that the alternative is not practical or real. On its face, the Arizona Unfair Sales Act does recognize practices enabling merchandisers to sell a particular product at a lower price than a competitor without selling below actual cost.

III. The Definitions of "Cost to the Retailer" Set Forth in A.R.S. §44-1461(A)(3) and §44-1461(A)(1)(c) Are Not Irreconcilably in Conflict nor Unconstitutionally Vague.

A.R.S. §44-1461 contains two definitions of "cost to the retailer." §44-1461(A)(1)(c) requires a 12% markup "in the absence of proof of a lesser cost."

defines "cost to the retailer" as bona fide costs."

The Arizona Court of Appeals, relying upon Trade Commission v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968) and Flank Oil Co. v Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960), rejected the argument that these definitions were vague, imprecise and in irreconcilable conflict. Those decisions hold that the statutes there involved, which were civil statutes without any criminal sanctions, simply required "reasonable accounting methods" and price determinations made by the retailer "in good faith." The Arizona Court of Appeals also held that the term "bona fide costs" merely required that claimed costs be "non-fraudulent."

The Arizona Court of Appeals has followed the time-tested rule of interpreting and applying related statutory sections within the same statute in harmony with one another. The concept of something being "bona fide" is common language and does not posit an impossible situation to affected retailers.

If the Arizona statutory scheme is

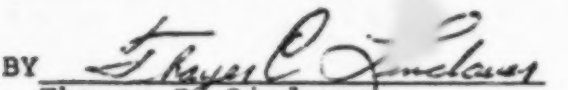
that which Petitioner suggests, an arbitrary 12% markup, then it is not vague. If it is as Respondent and the Arizona Court of Appeals suggests, perhaps arbitrary if sound evidence determines the concept of "proof of a lesser cost" to be non-existent, nonetheless, the standard of good faith application of a reasonable accounting system to show the proof of a lesser cost does not provide vagueness to the statute. The statutory scheme set forth by the Arizona Legislature requires a finding of intent and the use of the concept of "bona fide" costs does not conflict with the precise definitions of A.R.S. §44-1461 (A)(1)(c).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

THAYER C. LINDAUER, P.C.

BY 

Thayer C. Lindauer
222 N. Central Avenue
Phoenix, Arizona 85004
(602) 258-2787
COUNSEL OF RECORD FOR RESPONDENT

October, 1981

Appendix A — Arizona Superior Court Judgment. [Caption Deleted].

The Court having had under advisement the motions of Defendants, Circle K Corporation, Furr's Inc., Neb's Markets, A. J. Bayless Markets, Inc., Skaggs Drug Centers, Inc., Super X Drug Co., Bach T. Schlecht dba Economy Liquors, Farmers Produce Company, Inc., dba Farmers Quality Liquor Stores, Duppa Villa Liquors, Inc., Walgreen Arizona Drug Company, Safeway Stores, Inc., and Smitty's Super-Valu, Inc., to dismiss this action on the grounds that the statute under which it is brought is unconstitutional; the motions of Defendants, Circle K Corporation, Super X Drug Company, Furr's, Inc., Skaggs Drug Centers, Inc., Bach T. Schlecht dba Economy Liquors, Farmers Produce Company, Inc., dba Farmers Quality Liquor Stores, Duppa Villa Liquors, Inc., Walgreen Arizona Drug Company, Safeway Stores, Inc., and Smitty's Super-Valu, Inc. to dismiss those portions of Plaintiffs' Complaint relating to damages and alternative motion to strike; the motions of Defendants, Farmers Produce Company, Inc., dba Farmers Quality Liquor Stores, Skaggs Drug Centers, Inc., Bach T. Schlecht dba Economy Liquors, Safeway Stores, Inc., Duppa Villa Liquors, Inc., A. J. Bayless Markets, Inc., and Walgreen Arizona Drug Company to quash order to show cause; the motions of Defendants Super X Drug Company and Farmers Produce, Inc., dba Farmers Quality Liquor Stores for Summary Judgment; the motion of Defendant Safeway Stores, Inc., to sever; Plaintiffs' motion for leave to file first amended complaint; and the motions of several Defendants for protective orders and orders staying discovery, and the Court having considered said motions and the law applicable, determines that the statute under which this action is brought is unconstitutional and that said motions of the Defendants to dismiss are well taken

and should be granted and that the amendment of Plaintiff's Complaint would not affect the Court's decision, therefore, the Court orders, adjudges and decrees as follows:

IT IS ORDERED that the motions to dismiss of Defendants Circle K Corporation, Furr's Inc., Neb's Markets, A. J. Bayless Markets, Inc., Skaggs Drug Centers, Inc., Super X Drug Company, Bach T. Schlecht, dba Economy Liquors, Farmers Produce Company, Inc., dba Farmers Quality Liquor Stores, Duppa Villa Liquors, Inc., Walgreen Arizona Drug Company, Safeway Stores, Inc., and Smitty's Super-Valu, Inc. are granted.

JUDGMENT is hereby entered in favor of all defendants and Plaintiffs' Complaint is dismissed with prejudice as to all Defendants.

IT IS ORDERED that Defendants recover all their costs incurred.

IT IS FURTHER ORDERED that the order to show cause issued June 2, 1978, is quashed.

IT IS FURTHER ORDERED that Plaintiffs' motion for leave to file first amended complaint is denied.

IT IS FURTHER ORDERED that all other motions under advisement by the Court are now moot by reason of the ruling of the Court.

/S/Robert L. Myers
Robert L. Myers, Judge

DATED: Dec. 4, 1978

Appendix B — Arizona Court of Appeals Opinion. [Caption Deleted].

An Appeal from the Superior Court of Maricopa County
Cause No. C-369637
The Honorable Robert L. Myers, Judge
REVERSED AND REMANDED

WREN, Chief Judge

The central issue in this appeal is the constitutionality of Arizona's Unfair Sales Act, A.R.S. §§ 44-1461, – 44-1466.

Appellant, Baseline Liquors, filed a complaint in Maricopa County Superior Court on June 1, 1978 alleging that the various named appellees, since July 1, 1977, had advertised, offered to sell and sold liquor, beer and wine to the retailer at a price less than cost, as defined in the Arizona Unfair Sales Act. The complaint also alleged that these activities had reduced competition for the sale of these items within Maricopa County; had unreasonably restrained trade; and had tended to create a monopoly. Compensatory and punitive damages were sought by appellant, as well as an injunction enjoining appellees from advertising, offering to sell or selling liquor, beer or wine in violation of the Act.

The Arizona Unfair Sales Act, A.R.S. §§ 44-1461, – 44-1466 was passed into law in 1939 (Laws 1939, Ch. 39). Its broad purpose was to prohibit the "predatory" practice of selling items at below cost (so-called "loss leaders") for the purpose of injuring competitiors. Arizona was one of a large number of states to enact such a law beginning with South Carolina in 1902. However, the majority of states did not adopt similar legislation until after the passage of the Robinson-Patman Act (Act of

June 19, 1936, Ch. 592, 49 Stat. at L. 1526, 15 U.S.C. §§ 13, 13a, 13b). For a thorough survey of unfair sales acts in the various states *see* Annot. *Validity, construction, and application of statutory provision prohibiting sales of commodities below cost.*, 118 A.L.R. 506 *supplemented*, 128 A.L.R. 1126.

Several of the appellees filed motions to dismiss the complaint, asserting, *inter alia*, the unconstitutionality of the Unfair Sales Act. Following argument on the motions the trial court on December 6, 1978, dismissed the complaint on the ground that the Unfair Sales Act was unconstitutional. Since we have determined that this ruling cannot be upheld on the present record, we reverse and remand for further proceedings.

At the outset we note that there is a strong presumption supporting the constitutionality of a legislative enactment and the party asserting its unconstitutionality bears the burden of overcoming that presumption. *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *State v. Krug*, 96 Ariz. 225, 393 P.2d 916 (1964); *Landgraff v. Wagner*, 26 Ariz.App. 49, 546 P.2d 26 (1976).

A.R.S. § 44-1462 sets forth the legislative purpose in passage of the Unfair Sales Act:

> It is declared that the practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising an an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable

> consequences, including economic depression, and it is hereby declared to be the policy of this state to protect the well-being of its citizens through the prevention, suppression and elimination of unfair methods of competition. The purpose of this act is to carry out such policy in the public interest.

With this stated intent in mind, we turn to the arguments raised by appellees in support of their contention that the act is unconstitutional.

Appellees first contend that A.R.S. § 44-1461 (A)(1)(c)[1] is arbitrary because the 12 percent markup provision ignores various economies achieved by any particular retailer. Specifically, they point out that the 12 percent figure applies to all retailers regardless of size, location, type of business, business efficiencies or operational costs. Thus a retailer who operates in a more efficient manner with lower overhead costs is unable to pass these savings on to his customers if his actual cost of doing business is less than 12 percent. We disagree with this argument. The test for arbitrariness under the due process clauses of the federal and state constitutions is whether the legislative enactment is reasonably re-

---

[1] § 44-1461(A)(1)(c):

> A. In this article, unless the context otherwise requires:
>
> 1. "Cost to the retailer" means the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added:
>
> • • •
>
> (c) A markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be twelve per cent of the cost to the retailer as defined in this section after adding thereto freight charges and cartage but before adding thereto a markup.

lated to a legitimate state interest. *American Federation of Labor v. American Sash & Door Co.*, 67 Ariz. 20, 189 P.2d 912 (1948), *aff'd.* 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222, 6 A.L.R. 2d 481 (1949).[2] Here, appellees do not argue that the interest articulated in A.R.S. § 44-1462 is not a legitimate one. They further concede that the police power of the state extends to regulation and supervision of prices charged by private businesses in order to promote the general welfare. *State v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P.2d 650 (1941). The question, then, is whether this enactment is reasonably related to that interest. We believe that it is, or rather, on the record before us, we are unable to say that it is not. As mentioned earlier, this appeal comes to us on a grant of appellees' motions for dismissal. We find, however, that the record before us is completely devoid of any evidence, testimonial or otherwise, to support appellees' contention that the 12 percent figure is arbitrary. We are thus reduced to inspecting the provision on its face and are unable to say it is arbitrary simply because it establishes a fixed markup percentage. To the contrary, a fixed markup appears to us to be a reasonable means of achieving the stated goal of the act.[3]

---

[2]U.S. Constitution, amendment XIV, § 1, A.R.S. Constitution, Art. 2, § 4. Although *American Sash and Door* only referred specifically to the federal due process clause, we believe the test is the same under the state due process clause. *See Farmer v. Killingsworth*, 102 Ariz. 44, 424 P.2d 172 (1967), *Dimond v. Samaritan Health Service*, 27 Ariz.App. 682, 558 P.2d 710 (1976), *Cf. Valley National Bank of Phoenix v. Glover*, 62 Ariz. 538, 159 P.2d 292 (1945) (equal protection clauses of the federal and state constitutions have the same effect).

[3]We likewise reject appellees' contention that the act violates equal protection; the equal protection and due process clauses are satisfied if all persons in a class are treated alike. *State ex rel Babbit v. Pickrell*, 113 Ariz. 12, 545 P.2d 936 (1976). Here, the statute manifestly treats all retailers alike.

Appellees rely on *Serrer v. Cigarette Service Co.*, 148 Ohio St. 519, 76 N.E.2d 91 (1947) and *Cohen v. Frey & Son, Inc.*, 197 Md. 586, 80 A.2d 267 (1951). We have examined these cases and find them to be inapposite. Although both decisions determined that a fixed markup provision similar to the one considered here was arbitrary, the finding was based on the inherent difference between two types of wholesale operations; "regular" and the so-called "cash and carry". The differences between these two types of operation were found to be so great that any statutory attempt to treat the two in a similar fashion was determined to be arbitrary. Here of course, no such distinction is argued as to different types of retailers. Furthermore, in both *Serrer* and *Cohen*, unlike here, the distinction between the wholesale types was able to be fully explored, since both were appeals following full evidentiary trials on the merits.

Furthermore, we have determined that the statute here is not arbitrary for the reason that it contains a provision allowing a retailer to sell at a lower cost than the fixed 12 percent markup Since §§ 44-1461(A)(1)(c) states that the 12 percent shall be added "in the absence of proof of a lesser cost . . .", it thus provides a party with the opportunity of showing that, because its (his) costs were less than 12 percent, it could sell at some figure less than the statutorily designated percentage.

Appellees, however, claim that the "absence of proof of a lesser cost" provision in reality provides no alternative to the 12 percent markup figure because it is impossible for a retailer to determine the cost of doing business attributable to each item he sells. We disagree. This issue has been considered in two cases of neighboring jurisdictions, *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958 (1968) and *Flank Oil Company v. Tennessee Gas Transmission Company*, 141

Colo. 554, 349 P.2d 1005 (1960). In *Trade Commission*, the Utah Supreme Court stated:

> We agree with appellant's position that the lower court's conclusion that the 6% presumption provides no real alternative because it is "impractical" or "impossible" to prove actual cost under defendant's operating conditions, is neither supported by the evidence, nor is it in accordance with the guidelines this court has established in determining the constitutionality of a statute. We are of the opinion the trial court erred in holding the Act requires the cost must be exact. All the statute requires is a cost figure arrived at by reasonable accounting methods. A statute is not to be declared invalid because of difficulty in applying its provisions. We think the Act is sufficiently clear to require compliance. The constitutionality of a statute is not to be decided on questions of inconvenience, or difficulty in application of a cost standard. 21 Utah 2d at 439–440, 446 P.2d at 963–964 (footnotes omitted).

In *Flank Oil*, the same analysis was made:

> Hence, in the absence of provisions to the contrary, we must presume that the legislature did not intend to prescribe that the cost must be absolutely exact, and that it must be based upon the precise method of accounting which any one merchant might adopt, but meant, by "cost", what business men generally mean, namely, the approximate cost arrived at by a reasonable rule. Hence, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable, and does not disclose an intentional evasion of the law, the method so adopted should be accepted as correct. In other words, all that a man is required to do under the statute is to act in good faith. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed.402. In that view of the case, the standard set by the legislature

is virtually reduced to one of "reasonableness." And it is held that "reasonableness" as "a standard of an act, which can be determined objectively from circumstances, is a common, widely-used, and constitutionally valid standard in law." People v. Curtiss, 116 Cal.App.Supp. 771, 300 P. 801, 805, and cases cited. This, in our opinion, is a fair statement and meets with our approval.

There is no contention here that the cost must be absolutely exact. Good faith, however, is necessary. 141 Colo. at 566-657, 349 P.2d at 1012–1013, *citing Dikeou v. Food Distributors Association,* 107 Colo. 38, 108 P.2d 529 (1940).

We agree with the reasoning set forth in these cases and find that appellees have failed in their burden of proving that the "absence of proof of a lesser cost" provision provides no real alternative to the 12 percent markup provision. In so doing, we again note, that the fact that this case never went to trial precludes any attempt to rule on these issues, in that there is no record to which this court can refer. The same problem was alluded to in *Flank Oil.*

It is, of course, desirable that a full hearing be held in connection with constitutional objections. This view was expressed in the case of People ex. rel. Attorney General v. Barksdale, 104 Colo. 1, 87 P.2d 755, 757 wherein the Court declared:

"* * * Especially in disposing of constitutional objections is it important to give a full hearing, first in regard to the proper allegations in pleadings, and then—as a rule—on the facts, which after all must usually determine whether a particular situation dealt with by the legislative branch does or does not justify a particular enactment, and whether or not in some respects, not appearing from the allegations themselves, the General Assembly has over-

> stepped the constitutional bounds. 141 Colo. at 560–561, 349 P.2d at 1009.

In the absence of such a "full hearing", we reject the contention that the 12 percent markup is arbitrary and that the "absence of proof of a lesser cost" provision provides no alternative.

Appellees' next argument concerns the wording of A.R.S. § 44-1461(A)(3) which states:

> 3. "Cost to retailer" and "cost to the wholesaler" mean bona fide costs.

They assert that this definition is vague and imprecise and irreconcilably conflicts with the definition of "cost to the retailer" set forth in A.R.S. § 44-1461(A)(1). Again we disagree.

A.R.S. § 44-1461(A)(3) originally defined cost to the retailer and cost to the wholesaler as:

> bona fide costs; *and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler;* . . . Laws 1939, Ch. 39, § 2 (emphasis added).

As appellees point out, the emphasized portion was held to be unconstitutionally vague in *State v. Walgreen Drug Co., supra.* It was therefore severed from the rest of the statute, leaving the present wording. We do not find the term "bona fide" to be vague, because it has a well settled meaning in law. Webster's Third New International Dictionary (unabridged, 1969) defines it as "made in good faith without fraud or deceit . . . sincere . . . genuine." Black's Law Dictionary, Fourth Edition (1951) defines it as "In or with good faith; honestly, openly, and sincerely; without deceit or fraud". We think it is clear, then, that use of the term bona fide cost in A.R.S. § 44-1461(A)(3) means "non fraudulent". For this reason, we reject ap-

pellees' argument regarding any conflict between §§ 44-1461 (A)(1) and 44-1461(A)(3). In our opinion, the former section sets forth the technical definition of cost, whereas the latter requires that such claimed costs be non-fraudulent.

Since appellees' next two arguments are conceptually related, we consider them together. Referring to the provision of the act allowing for penal liability, they first posit that the act fails to require sufficient criminal intent to satisfy due process. As support they refer us to A.R.S. § 44-1464, which makes it illegal for any retailers to advertise, offer to sell or sell any merchandise at less than cost "with the intent or effect of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor or otherwise injuring a competitor . . ." This argument continues that since the statute reads in the disjunctive ("either intent *or* effect . . .") it impermissibly renders it unnecessary to prove intent to violate it. Again we find this argument to be without merit. The exact issue was considered in *State v. Walgreen Drug Co., supra*, wherein it was stated:

> We consider then the objection that the chapter imposes both civil and penal liability upon one who violates its provisions without any criminal intent . . . we think that while it is not explicitly stated therein that the particular thing done must be done with a criminal intent, the only reasonable implication from the entire language of the chapter is that such intent is an essential ingredient of a violation thereof. A similar construction has been given to statutes which fail, as does ours, explicity to require the criminal intent. 57 Ariz. at 317, 113 P.2d at 654–655.

Appellees, however, point out that the legislature reenacted the act after *Walgreen* and retained the disjunctive language; that therefore this court is not bound by its holding. We disagree. *Walgreen* found that the lan-

guage of the chapter made it clear that intent is an essential ingredient in proving a violation of the act. In our opinion, the mere fact that the legislature re-enacted the act with the language unchanged does not render *Walgreen* inapplicable. We therefore follow its holding.

Appellees next challenge concerns the wording of A.R.S. § 44-1466 which states:[4]

> A. Any retailer who, in contravention of the policy of this article, advertises, offers to sell or sells at retail any item of merchandise at less than cost to the retailer as defined in this article or any wholesaler who, in contravention of the policy of this article advertises, offers to sell or sells at wholesale any item of merchandise at less than cost to the wholesaler as defined in this article, is guilty of a petty offense.
>
> B. Proof of any advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this aricle is prima facie evidence of a violation of this article.

Appellees assert that paragraph (B) creates a prima facie presumption of intent to injure, thus unconstitutionally placing the burden of proving lack of intent upon the defendant. We disagree. There is no alteration of the burden of proof in a prosecution under the statute. Such burden of proof remains, as it must, on the state. *State v. Garcia*, 116 Ariz. 546, 570 P.2d 488 (1977). What the statute does permit, however, is the use by the state of an evidentiary presumption of a violation upon proof that a retailer has advertised, offered to sell or sold in con-

---

[4]After filing of the motions for dismissal but before judgment, A.R.S. § 44-1466 was amended, the penalty for violation being reduced from a misdemeanor to a petty offense. Since this change is irrelevant as to the issue raised regarding the statute, we refer to the amended version.

travention of the policy of the article. As such, the presumption is not unlike those allowed in other areas of criminal law such as the presumption of intoxication from proof of the presence of 0.15 percent or more by weight of alcohol in a person's blood, *State v. Childress*, 78 Ariz. 1, 274 P.2d 333, 46 A.L.R.2d 1169 (1954), the presumption of sanity in criminal prosecutions, *State v. Sanchez*, 117 Ariz. 369, 573 P.2d 60 (1977) or the presumption that driving in excess of the posted speed limit is unreasonable and unlawful. *State v. Rich*, 115 Ariz. 119, 563 P.2d 918 (App. 1977).

Appellees' final argument is that the act constitutes a price fixing statute in violation of the Sherman Act[5] and is not within the state action exemption of the Sherman Act, citing *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978). We disagree. The *Rice* opinion dealt with a fair trade law in California. It found that the law violated the Sherman Act and was not protected by the state action exemption to the law. That is not the situation here, since this statute is not a fair trade act, but one which prohibits below-cost sales for the purpose of injuring competition. That there is a difference is manifested by the fact that until 1976, Arizona had *both* a fair trade act *and* an act prohibiting below-cost sales. The former was repealed, Laws 1976, Ch. 81 § 13. It is also manifested by the fact that *Rice*, after holding that the California fair trade statute violated the Sherman Act, affirmed the validity of California's "loss leader" prohibition statute, the analogue of Arizona's Unfair Sales Act:

> Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of the price maintenance laws

---

[5]15 U.S.C. § 1 *et. seq.*

> without running afoul of the Sherman Act. Thus, our laws prohibit the sale of any product as a "loss leader (Bus. & Prof. Code, § 17044) . . ." 21 Cal. 3d at 458, 146 Cal.Rptr. at 603, 579 P.2d at 494.

We thus hold that the Sherman Act is inapplicable to the Unfair Sales Act because the Unfair Sales Act is not a price-fixing statute.[6] As was stated in *Drink, Inc. v. Babcock*, 77 N.M. 277, 421 P.2d 798 (1966).

> [T]he legislature has the power to act on the subject of below-cost sales and their effect on free competition, and may adopt legislation relating to the establishing of prices on alcoholic beverages with the view and purpose of regulating and controlling the liquor business in the interest of the public welfare. 77 N.M. at 284, 421 P.2d at 803.

The judgment of the trial court dismissing appellant's complaint is reversed and remanded.

/S/Laurance T. Wren
LAURANCE T. WREN,
CHIEF JUDGE
Division One

---

[6]*Cf. State v. Arizona Licensed Beverage Association, Inc.*, No. 14692 (Supreme Court, filed March 11, 1981) (agreements authorized by fair trade act are excepted from antitrust prohibitions of state antitrust act.)

CONCURRING:

/S/Joe W. Contreras

JOE W. CONTRERAS,
PRESIDING JUDGE
Department A

/ S/Francis J. Donofrio

FRANCIS J. DONOFRIO,
JUDGE

Appendix C — Arizona Court of Appeals Order Denying Motion for Rehearing.
[Caption Deleted]

The motion for rehearing and the response thereto were considered by the Court, Presiding Judge Joe W. Contreras and Judges Laurance T. Wren and Francis J. Donofrio participating.

IT IS ORDERED denying the motion.

DATED this 27th day of May, 1981.

/S/Joe W. Contreras
JOE W. CONTRERAS,
PRESIDING JUDGE
Department A

Appendix D-1

Appendix D — Order of Arizona Supreme Court Denying Petition for Review.
[Caption Deleted]

The following action was taken by the Supreme Court of the State of Arizona on June 16, 1981 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 17th day of June, 1981.

S. ALAN COOK, Clerk
By /S/Linda J. Quintans
Deputy Clerk

[List of those receiving notice deleted.]

Appendix E — Constitutional Provisions and Statutes Involved.

1. United States Constitution, Amendment 14: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 15 U.S.C. § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

3. A.R.S. § 44-1461 *et seq.*

   "§ 44-1461. Definitions

   A. In this article, unless the context otherwise requires:

   1. "Cost to the retailer" means the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added:

   (a) Freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as defined in this section.

   (b) Cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three fourths of one per cent of the cost to the retailer as defined in this section after adding thereto freight charges but before adding thereto cartage and markup.

   (c) A markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be twelve per cent of the

cost to the retailer as defined in this section after adding thereto freight charges and cartage but before adding thereto a markup . . . .

3. "Cost to the retailer" and "cost to the wholesaler" mean bona fide costs . . . .

5. "Retailer" means and includes every person, partnership, corporation or association engaged in the business of making sales at retail within this state, except that, in the case of a person, partnership, corporation or association engaged in the business of making sales both at retail and sales at wholesale, the term shall be applied only to the retail portion of the business . . . .

§ 44-1464. Certain advertising and sales defined as unfair competition contrary to public policy

Any advertising, offer to sell or sale of any merchandise by retailers or wholesalers at less than cost as defined in this article, with the intent or effect of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, is unfair competition and contrary to public policy and the policy of this article where the result of advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to lessen competition substantially, or to restrain trade unreasonably, or to tend to create monopoly in any line of commerce.

§ 44-1465. Jurisdiction of courts to enjoin violations of article; duty of county attorneys to bring actions to restrain violations; availability of injunctive relief to private persons

A. In addition to the penalties provided in § 44-1466,

the courts of this state shall have jurisdiction to prevent and restrain violations of this article. The county attorneys, in the respective counties, shall institute proceedings to prevent and restrain violations.

B. Any person damaged or who is threatened with loss or injury by reason of a violation of this article, may bring an action for injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation of this article.

§ 44-1466. Violations; penalties

A. Any retailer who, in contravention of the policy of this article, advertises, offers to sell or sells at retail any item of merchandise at less than cost to the retailer as defined in this article, or any wholesaler who, in contravention of the policy of this article advertises, offers to sell or sells at wholesale any item of merchandise at less than cost to the wholesaler as defined in this article, is guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars.

B. Proof of any advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this article is prima facie evidence of a violation of this article.